Frankey Leong Pit Fui (as the administrator of the estate of Louis Leong Kui Yung, deceased) v Foong Da Realty Sdn Bhd

A

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)(NCvC)-389–03 OF 2019
LAU BEE LAN, NANTHA BALAN AND SUPANG LIAN JJCA
23 OCTOBER 2020

C

Civil Procedure — Res judicata — Subsequent suit with same subject matter and same parties — Court of Appeal ('COA') upheld trial court's decision on contractual dispute between plaintiff and defendant in plaintiff's favour — Defendant, instead of appealing COA's decision, filed fresh suit challenging correctness of trial court's decision and sought to vary/rectify orders made by trial court — Whether trial court's decision was final conclusive and binding between the parties and could not be reviewed or called into question in fresh suit — Whether defendant's failure to appeal against COA's verdict meant he agreed with the decisions of both the COA and the trial court — Whether res judicata in its 'narrow' sense applied to bar defendant from re-litigating in fresh suit issues already adjudicated upon by the trial court — Whether res judicata in its 'wider' sense precluded defendant from raising in fresh suit matters which could have been, but were not, raised in the earlier suit

D

E

Two co-owners ('the deceased' and 'Jeff') of a 4,250-acre piece of land ('the land') signed three agreements ('the three agreements') with the respondent developer ('FDR') under which they agreed to: (a) transfer to FDR part of the land for residential development in return for being given four houses in a housing project developed by FDR; (b) assign to FDR the remaining part of the land (1.8 acres) for commercial development in exchange for three shoplots ('the three shoplots') to be built thereon by FDR. Although the aforesaid houses and shoplots were built and transferred by FDR to the landowners, they failed to transfer/deliver vacant possession of the land to FDR as promised under the three agreements. Sometime after the appellant ('Frankey') became the administrator of the deceased's estate, FDR and another party sued, among others, Frankey and Jeff (in whose names the land had been registered) in the High Court ('Suit 92') for damages for breach of the three agreements, breach of trust and conspiracy to defraud. The plaintiffs sought an order that the three agreements be specifically performed and that the land be transferred to them. FDR contended that since it had fulfilled its part of the bargain under the three agreements, it was entitled to beneficial ownership of the land and that Frankey and Jeff held the land as bare trustees for FDR. The court agreed with that argument and, inter alia: (i) declared FDR as the beneficial owner of the land subject to Jeff's and the deceased's interests and rights in the three shoplots; (ii) ruled that having obtained the consideration under the three agreements, the

F

G

H

I

deceased and Jeff had divested themselves of all proprietary rights in the land (apart from the three shoplots) and that they held it merely as bare trustees for FDR; and (iii) granted specific performance of the three agreements and ordered the land to be transferred to FDR. The Court of Appeal ('COA') upheld the High Court's decision. Instead of appealing against the COA's verdict, Frankey filed a fresh suit ('Suit 123') against FDR for the following reliefs: (1) a declaration that under the three agreements, only that part of the land allocated for 'residential' development was transferrable to FDR but not the portion for 'commercial' development and, therefore, the orders of the court in Suit 92 should be varied/rectified to reflect that position; (2) a declaration that two of the three agreements (the development agreement and deed of variation) had been validly terminated; (3) alternatively, a declaration that specific performance of the three agreements could not be granted; and (4) that FDR should pay damages (to be assessed) for breaching the three agreements. FDR applied to strike out Suit 123 under O 18 r 19 and/or O 92 r 4 of the Rules of Court 2012 on the ground that Suit 123 sought to re-litigate issues that had already been adjudicated upon, or could have been adjudicated upon, in Suit 92 and therefore res judicata rendered Suit 123 devoid of a reasonable cause of action and made it frivolous, vexatious and an abuse of process of the court. The instant appeal was against the High Court's decision to strike out Suit 123.

Held, unanimously dismissing the appeal:

(1) Suit 92 pertained to both the 'residential land' and the 'commercial land'. The orders that were granted in Suit 92 indisputably pertained to both the 'residential land' and the 'commercial land'. Frankey's attempt to suggest that Suit 92 was only confined to the 'residential land' was disingenuous, misguided and untenable. The court's decision in Suit 92 was final, conclusive and binding on all the parties to that suit and their privies. The Court of Appeal ('COA') upheld the High Court's decision. Frankey did not appeal against the COA's decision and therefore he was deemed to have accepted the correctness of the COA's decision, and by extension, the High Court's decision in Suit 92. Hence, the decision in Suit 92 was no longer open to review or to be called into question in Suit 123 (see paras 78–80 & 84–86).

(2) Frankey failed to show that the High Court had erred in striking out Suit 123. The High Court judge had exercised her discretion correctly in coming to her decision after considering all the relevant facts and circumstances and properly applying the principles of law applicable (see paras 87–90).

(3) Suit 123 was barred by res judicata both in its 'narrow' and 'wider' senses'. Suit 123 referred to the three agreements and the same subject matter as in Suit 92. For all intents and purposes, Suit 123 sought to re-litigate the

same matters and issues which were raised and were finally and conclusively decided on the merits in Suit 92, which decision was upheld by the Court of Appeal. In Suit 123, Frankey sought to attack the correctness of the judgment in Suit 92 and to impugn the three agreements by saying that the orders made in Suit 92 should be limited to the 'Residential Land' and that the three agreements had been validly terminated. Frankey was a party to Suit 92 both in his personal capacity and as administrator of the deceased's estate and he could have filed a counterclaim there but he did not do so. That failure did not give him a second chance to resurrect via Suit 123 issues that were raised and adjudicated upon in Suit 92. Res judicata, in the wider sense, precluded issues that could have been raised in the earlier suit but were not. The matters that were raised in Suit 123 were either already raised in Suit 92 or were matters which could have been raised in that suit but were not (see paras 53–56 & 63–64 & 69).

(4) Whilst the application of res judicata would not occasion injustice to Frankey, its non-application in the circumstances of the case would be a gross injustice to FDR because FDR had fulfilled its bargain under the three agreements and had given the requisite consideration (the house units) to the deceased and Jeff as per the deed of exchange but FDR was not given legal ownership of the residential land in return. Also, despite the landowners' delay in handing over vacant possession of the commercial land, FDR nevertheless completed the construction of the shop lots (save for the wiring). In addition, transfer of the legal ownership of the commercial land to FDR was stultified by the actions of the deceased, Jeff and other related parties and the considerable delay in the project caused massive financial implications for FDR to the extent that it was wound up on the application of the bank that provided it the bridging loan as a result of FDR's inability to service that loan (see paras 25, 27, 69 & 71).

(5) Considering the factual matrix concerning the three agreements and the breaches thereof by the deceased and Jeff in the manner discussed in the judgment of the High Court in Suit 92, it was not surprising that the court there found that Jeff and Frankey held the land as bare trustees for FDR as the beneficial owner thereof (see para 77).

(6) With regard to Frankey's assertion that he (on behalf of the deceased's estate) terminated the development agreement ('DA') and the deed of variation ('DOV') pertaining to the commercial land on 5 November 2018 by reason of FDR's purported failure to deliver up the shoplots and for failing to subdivide the land as well as in charging the land to the bank, it should be noted that the so-called letter of termination was issued after Frankey had obtained the Jadual Tiga on 18 October 2018, which was well after the judgment in Suit 92 was granted and that

judgment had been upheld by the Court of Appeal. The complaint that FDR had breached the DA and DOV did not give a right to terminate those agreements. If the shoplots were not delivered as per the contractual timeline, the landowners' remedy lay in claiming for liquidated and ascertained damages (as provided for in the contract) and nothing more. In any case, the delay in the completion of the commercial project (the shoplots) was wholly caused by the landowners themselves in delaying the handing over of vacant possession of the commercial land (see paras 66, 68 & 81).

(7) With respect to Frankey's claim that he held a half-share that belonged to the deceased in the land, the High Court in Suit 92 had unequivocally ruled that Frankey, as the successor-in-title of the deceased's estate, held the land as bare trustee for FDR who was the beneficial owner thereof. The deceased's estate, as a bare trustee for FDR, could not transfer to Frankey what it had not got since Frankey's rights as transferee were derived from those of the deceased's estate as transferor. Frankey's rights or the rights of the deceased's estate (if any) had 'merged' in the judgment of the High Court in Suit 92. In the light of that decision, the rights that Frankey seemed to be advancing or prosecuting were all defeated by the *nemo dat quod non habet* rule (see paras 72 & 82–83).

[Bahasa Malaysia summary

Dua pemilik bersama ('si mati' dan 'Jeff') sekeping tanah seluas 4,250 ekar ('tanah tersebut') telah menandatangani tiga perjanjian ('ketiga-tiga perjanjian tersebut') dengan pemaju responden ('FDR') di mana mereka bersetuju untuk: (a) memindahmilik kepada FDR sebahagian tanah tersebut untuk pembangunan kediaman dengan balasan diberi empat rumah dalam projek perumahan yang dibangunkan oleh FDR; and (b) menyerah hak kepada FDR baki tanah yang selebihnya (1.8 ekar) untuk pembangunan komersial dengan balasan untuk tiga lot kedai ('tiga lot kedai tersebut') yang akan dibina oleh FDR. Walaupun rumah dan lot kedai tersebut telah dibina dan dipindahmilik oleh FDR kepada pemilik tanah, mereka gagal memindahmilik/menyerahkan milikan kosong tanah tersebut kepada FDR seperti yang dijanjikan di bawah ketiga-tiga perjanjian tersebut. Beberapa ketika selepas perayu ('Frankey') menjadi pentadbir hartanah si mati, FDR dan pihak lain menyaman, antara lain, Frankey dan Jeff (yang mana namanya telah didaftarkan atas tanah tersebut) di Mahkamah Tinggi ('Guaman 92') untuk ganti rugi kerana melanggar ketiga-tiga perjanjian tersebut, pecah amanah dan konspirasi untuk menipu. Plaintif memohon satu perintah agar ketiga-tiga perjanjian tersebut dilaksanakan secara spesifik dan agar tanah tersebut dipindahmilik kepada mereka. FDR berpendapat bahawa kerana ia telah memenuhi tanggungjawabnya di bawah ketiga-tiga perjanjian tersebut, ia berhak mendapat hak milik benefisial atas tanah tersebut dan bahawa Frankey dan Jeff memegang tanah tersebut sebagai pemegang amanah untuk FDR. Mahkamah

bersetuju dengan hujahan tersebut dan, antara lain: (i) mengisytiharkan FDR sebagai pemilik benefisial tanah yang tertakluk kepada kepentingan dan hak Jeff dan si mati atas ketiga-tiga lot kedai; (ii) memutuskan bahawa setelah mendapat balasan di bawah ketiga-tiga perjanjian tersebut, si mati dan Jeff telah melepaskan diri dari kesemua hak milikan atas tanah (selain dari tiga lot kedai) dan bahawa mereka memegangnya hanya sebagai pemegang amanah untuk FDR; dan (iii) membenarkan perlaksanaan spesifik ketiga-tiga perjanjian tersebut dan memerintahkan tanah untuk dipindahmilik kepada FDR. Mahkamah Rayuan ('MR') mengekalkan keputusan Mahkamah Tinggi. Dari merayu terhadap keputusan MR, Frankey sebaliknya memfailkan tuntutan baru ('Guaman 123') terhadap FDR untuk relif berikut: (1) satu deklarasi bahawa di bawah ketiga-tiga perjanjian tersebut, hanya sebahagian tanah yang diperuntukkan untuk pembangunan 'kediaman' harus dipindahmilik kepada FDR tetapi bukan bahagian untuk pembangunan 'komersial' dan, oleh itu, perintah Mahkamah dalam Guaman 92 harus diubah/diperbaiki untuk mencerminkan kedudukan tersebut; (2) satu deklarasi bahawa dua dari tiga perjanjian (perjanjian pembangunan dan surat ikatan perubahan) telah ditamatkan secara sah; (3) sebagai alternatif, satu deklarasi bahawa perlaksanaan spesifik pada ketiga-tiga perjanjian tersebut tidak harus dibenarkan; dan (4) bahawa FDR harus membayar ganti rugi (yang akan ditaksirkan) karena melanggar ketiga-tiga perjanjian tersebut. FDR memohon untuk membatalkan Guaman 123 di bawah A 18 k 19 dan/atau A 92 k 4 Kaedah-Kaedah Mahkamah 2012 dengan alasan bahawa Guaman 123 cuba untuk membicarakan semula isu yang telah diputuskan, atau mungkin telah diputuskan, dalam Guaman 92 dan oleh itu res judicata menjadikan Guaman 123 terbatal tanpa kausa tindakan yang munasabah dan menjadikannya tidak remeh, menyusahkan dan penyalahgunaan proses mahkamah. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi untuk membatalkan Guaman 123.

Diputuskan, dengan sebulat suara menolak rayuan:

(1) Guaman 92 berkaitan dengan 'Tanah Kediaman' dan 'Tanah Komersial'. Perintah yang diberikan dalam Guaman 92 tidak dapat disangkal lagi adalah berkaitan dengan 'Tanah Kediaman' dan 'Tanah Komersial'. Percubaan Frankey untuk menyatakan bahawa Guaman 92 hanya dalam batasan 'Tanah Kediaman' adalah tidak masuk akal, salah arah dan tidak dapat dipertahankan. Keputusan Mahkamah dalam Guaman 92 adalah akhir, muktamad dan mengikat kesemua pihak dalam tindakan tersebut dan kerahsiaannya. Mahkamah Rayuan ('MR') mengekalkan keputusan Mahkamah Tinggi. Frankey tidak merayu terhadap keputusan MR dan oleh itu beliau dianggap telah menerima ketepatan keputusan MR, dan secara tidak langsung, keputusan Mahkamah Tinggi dalam Guaman 92. Oleh itu, keputusan dalam Guaman 92 tidak lagi terbuka untuk dikaji

atau dipersoalkan dalam Guaman 123 (lihat perenggan 78–80 & 84–86).

(2) Frankey gagal menunjukkan bahawa Mahkamah Tinggi telah terkhilaf dalam membatalkan Guaman 123. Hakim hakim Mahkamah Tinggi telah menggunakan budi bicaranya dengan tepat dalam membuat keputusan setelah mempertimbangkan kesemua fakta dan keadaan yang relevan dan menerapkan prinsip-prinsip perundangan dengan wajar (lihat perenggan 87–90).

(3) Guaman 123 telah dihalang oleh res judicata baik dalam pengertian 'sempit' dan 'lebih luas'. Guaman 123 merujuk kepada ketiga-tiga perjanjian dan perkara utama yang sama seperti dalam Guaman 92. Untuk kesemua maksud dan tujuan, Guaman 123 cuba untuk membicarakan semula perkara dan isu yang sama yang telah dibangkitkan dan akhirnya dan dengan muktamadnya diputuskan berdasarkan merit dalam Guaman 92, keputusan yang dikekalkan oleh Mahkamah Rayuan. Dalam Guaman 123, Frankey cuba untuk menhujahkan kebenaran keputusan dalam Guaman 92 dan untuk membantah ketiga-tiga perjanjian tersebut dengan mengatakan bahawa perintah yang dibuat dalam Guaman 92 harus dihadkan hanya pada 'tanah kediaman' dan ketiga-tiga perjanjian tersebut telah ditamatkan secara sah. Frankey adalah pihak Guaman 92 kedua-duannya atas kemampuan peribadinya dan sebagai pentadbir harta pusaka si mati dan beliau boleh mengemukakan tuntutan balas tetapi beliau tidak melakukannya. Kegagalan tersebut tidak memberinya peluang kedua untuk membangkitkan kembali melalui Guaman 123 isu-isu yang dibangkitkan dan diputuskan dalam Guaman 92. Res judicata, dalam pengertian yang lebih luas, menghalang isu-isu yang mungkin telah dibangkitkan dalam tuntutan sebelumnya tetapi tidak. Perkara-perkara yang dibangkitkan dalam Guaman 123 sama ada sudah dibangkitkan dalam Guaman 92 atau perkara-perkara yang mungkin dibangkitkan dalam saman tersebut tetapi tidak (lihat perenggan 53–56, 63–64 & 69).

(4) Walaupun penggunaan res judicata tidak membangkitkan ketidakadilan terhadap Frankey, ketidakpenggunaannya dalam keadaan kes tersebut akan menjadi ketidakadilan yang besar terhadap FDR kerana FDR telah memenuhi tanggungjawabnya di bawah ketiga-tiga perjanjian tersebut dan telah memberikan balasan yang sewajarnya (unit rumah) kepada si mati dan Jeff berdasarkan surat ikatan pertukaran tetapi FDR tidak diberi hakmilik perundangan atas tanah kediaman sebagai balasannya. Selain itu, walaupun terdapat kelewatan pemilik tanah untuk menyerahkan milikan kosong atas tanah komersial, FDR tetap menyempurnakan pembinaan lot kedai (kecuali pendawaian). Di samping itu, pindahmilik tanah komersial kepada FDR dibantah oleh tindakan si mati, Jeff dan pihak-pihak lain yang berkaitan dan kelewatan

yang besar dalam projek tersebut telah menyebabkan implikasi kewangan besar-besaran bagi FDR sehingga akhirnya digulung berdasarkan permohonan oleh bank yang memberikannya pinjaman jangka pendek akibat ketidakmampuan FDR untuk membayar pinjaman tersebut (lihat perenggan 25, 27, 69 & 71).

(5) Mengambil kira matriks fakta mengenai tiga perjanjian dan pelanggarannya oleh si mati dan Jeff dengan cara yang dibahas dalam penghakiman Mahkamah Tinggi dalam Guaman 92, ia tidak mengejutkan bahawa mahkamah mendapati bahawa Jeff dan Frankey memegang tanah sebagai pemegang amanah untuk FDR sebagai pemilik benefisialnya (lihat perenggan 77).

(6) Berkenaan dengan pernyataan Frankey bahawa beliau (atas harta pusaka si mati) menamatkan perjanjian pembangunan ('DA') dan surat ikatan perubahan ('DOV') berkaitan dengan Tanah Komersial pada 5 November 2018 dengan alasan FDR kononnya gagal menyerahkan lot-lot kedai dan kerana gagal membahagikan hak tanah dan juga menggadai tanah kepada bank, harus diperhatikan bahawa surat penamatan yang kononnya tersebut dikeluarkan setelah Frankey memperoleh Jadual Tiga pada 18 Oktober 2018, yang tepat setelah penghakiman dalam Guaman 92 dibenarkan dan penghakiman tersebut telah dikekalkan oleh Mahkamah Rayuan. Aduan bahawa FDR telah melanggar DA dan DOV tidak memberikan hak untuk menamatkan perjanjian tersebut. Sekiranya lot-lot kedai tidak diserahkan mengikut garis masa kontrak, maka remedi pemilik tanah adalah untuk menuntut gantirugi kelewatan yang ditetapkan (seperti yang diperuntukkan dalam kontrak) dan tidak lebih dari itu. Walau apapun, kelewatan penyiapan projek komersial (lot-lot kedai) disebabkan adalah sepenuhnya oleh pemilik tanah sendiri yang menangguhkan penyerahan hak milikan kosong tanah komersial (lihat perenggan 66, 68 & 81).

(7) Berkenaan dengan tuntutan Frankey bahawa beliau memegang setengah bahagian milik si mati atas tanah tersebut, Mahkamah Tinggi dalam Guaman 92 telah memutuskan secara tegas bahawa Frankey, sebagai pengganti hak milik harta pusaka si mati, memegang tanah sebagai pemegang amanah untuk FDR yang merupakan pemiliknya benefisial. Harta pusaka si mati, sebagai pemegang amanah untuk FDR, tidak dapat dipindahmilik kepada Frankey apa yang beliau tidak harus perolehi kerana hak Frankey sebagai penerima pindahmilik berasal dari harta pusaka si mati sebagai pemindahmilik. Hak Frankey atau hak harta pusaka si mati (sekirabya ada) telah 'bergabung' dalam penghakiman Mahkamah Tinggi dalam Guaman 92. Berdasarkan keputusan tersebut, hak-hak yang sepertinya dikemukakan atau dibicarakan oleh Frankey ditewaskan oleh peraturan *nemo dat quod non habet* (lihat perenggan 72 & 82–83).]

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley Sdn Bhd [2007] 5 MLJ 697; [2007] 6 CLJ 93; [2007] 5 AMR 453, FC (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1 MLRA 611; [1995] 3 AMR 2559, SC (refd)

Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 MLRA 183; [1998] 1 AMR 909, FC (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 AMR 1537; [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321; [2001] 1 MLRA 98, CA (consd)

Foong Da Realty Sdn Bhd & Anor v Albert Leong & Ors [2018] 8 BLR 545, HC (refd)

Frankey Leong Pit Fui v Foong Da Realty Development Sdn Bhd [2019] AMEJ 0526; [2019] 1 LNS 741; [2019] 2 SSLR 185, HC (refd)

He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662; [2020] MLJU 916; [2020] 7 CLJ 271; [2020] 1 LNS 663; [2020] 5 AMR 645; [2020] AMEJ 0637, FC (refd)

Henderson v Henderson (1843) 67 ER 313 (refd)

Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 3 CLJ 1; [2018] 2 MLJ 133; [2018] MLJU 32; [2018] 1 AMR 837; [2018] AMEJ 0027, FC (folld)

Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188; [2015] 8 CLJ 1173; [2015] 3 MLRA 652; [2015] 4 AMR 31; [2015] AMEJ 775, FC (folld)

Tan Ong Ban v Teoh Kim Heng [2016] 2 AMR 813; [2016] 3 CLJ 193, FC (refd)

Yeong Ah Chee v Lee Chong Hai & Anor And Other Appeals [1994] 2 MLJ 614; [1994] 3 CLJ 20; [1994] 2 AMR 1445, SC (folld)

Legislation referred to

Administration of Native and Small Estates Ordinance 1941 (Cap 1) s 5
Evidence Act 1950 s 40
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(d), O 92 r 4

Appeal from: Civil Suit No BKI-22NCvC-123/12 of 2018 (High Court, Kota Kinabalu)

Cham Ngit Shin @ Ronny Cham (Teo Xiao Lei with him) (Ronny Cham & Co) for the appellant.
Kong Hong Ming @ Kong Fo Min (Lee & Kong) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned Judicial Commissioner ('the JC') (as she then was) dated 18 February 2019 to strike out Kota Kinabalu High Court Suit No BKI-22NCvC-123/12 of 2018 ('Suit 123') pursuant to O 18 r 19(1)(a) and/or (1)(b) and/or (1)(d) and/or O 92 r 4 of the Rules of Court 2012 ('the ROC').

[2] The appellant (plaintiff) is Frankey Leong Pit Fui ('Frankey'). Frankey filed Suit 123 on 12 December 2018 in his capacity as the administrator of the estate of Louis Leong Kui Yung ('the deceased'). Frankey is the son of the deceased. According to Frankey, he became the lawful administrator of the estate of the deceased pursuant to a letter of administration described as Jadual Tiga which was issued on 18 October 2018. The sole defendant in Suit 123 is Foong Da Realty Sdn Bhd ('FDR').

[3] There was a previous litigation involving Frankey and FDR via Kota Kinabalu High Court Suit No BKI-22–92/8 of 2013 ('Suit 92'). The dispute which precipitated Suit 92 is over a parcel of land situated in the district of Penampang, Sabah. The land was the subject of three agreements between its owners and FDR (see para 17 below).

[4] The deceased was a co-owner of the land. FDR and a co-palintiff filed Suit 92 and claimed that the owners and the administrators or successors-in-title of the estate of the deceased had breached the three agreements. Essentially, in Suit 92, FDR sought declarations to assert its beneficial ownership of the whole of the land and for various consequential orders, including an order for transfer of the land to FDR.

[5] The parties in Suit 92 are as follows.

[6] FDR was the first plaintiff.

[7] The second plaintiff was March Advantage Sdn Bhd ('March Advantage').

[8] The first defendant was Albert Leong (sued as the Administrator of the Estate of the deceased and in his personal capacity) ('Albert'). Albert is one of the sons of the deceased. After the death of the deceased, Albert took out a letter of administration at the Penampang Native Court (*Jadual Tiga*) to administer the estate. Albert discharged himself as administrator and his brother, Frankey

A took over as administrator under a fresh *Jadual Tiga* issued on 22 December 2011.

[9] The second defendant was Teo Ann Su @ Christopher Teo.

B

[10] Frankey was the third defendant in Suit 92. He was sued as the administrator of the estate of the deceased and in his personal capacity as well. Frankey did not file any counterclaim in Suit 92.

C **[11]** At that time Frankey relied on the *Jadual Tiga* granted on 22 December 2011 by the Penampang Native Court. In Suit 92 Frankey held himself out as an administrator of the estate of the deceased.

[12] Jeff Leong ('Jeff') was the fourth defendant. Jeff filed a counterclaim in
D Suit 92. Jeff is a nephew of the deceased.

[13] The Registrar of Titles, Department of Lands & Surveys, Sabah was the fifth defendant. They were a nominal defendant and agreed to abide by the High Court's final judgment.

E

[14] The trial in respect of Suit 92 took almost three years to complete. The trial started on 21 October 2013. The final trial date was 7 October 2016. The decision of the learned judge in Suit 92 was handed down on 10 October 2016. The decision of the High Court in Suit 92 is reported as *Foong Da Realty Sdn*
F *Bhd & Anor v Albert Leong & Ors* [2018] 8 BLR 545 (HC). The decision was in favour of FDR and March Advantage.

[15] Frankey appealed to the Court of Appeal via Civil Appeal
G No S-02(W)-2046–11 of 2016. Jeff also appealed to the Court of Appeal via Civil appeal No S-02(W)-2141–11 of 2016. Jeff withdrew his appeal on 25 July 2017.

[16] The Court of Appeal dismissed Frankey's appeal on 28 July 2017.
H Frankey did not take the matter up to the Federal Court.

[17] By a notice of application dated 21 December 2018 (encl 6), FDR applied to strike out Suit 123 and sought for an order that the Statement of Claim dated 12 December 2018 ('the SOC') and the action be struck out
I pursuant to O 18 r 19(1)(a) and/or (1)(b) and/or (1)(d) and/or O 92 r 4 of the Rules of Court 2012 ('the ROC').

[18] On 18 February 2019 the learned judicial commissioner ('the JC') (as she then was) allowed FDR's application and struck out Suit 123 (see *Frankey*

Leong Pit Fui v Foong Da Realty Development Sdn Bhd [2019] AMEJ 0526; [2019] 1 LNS 741; [2019] 2 SSLR 185 (HC)).

[19] Frankey appealed to this court. On 23 October 2020 we dismissed the appeal. These are the reasons for our decision.

THE AGREEMENTS

[20] The principal documents ie the three agreements, which featured in Suit 92 and which are relevant to Suit 123 are the deed of exchange dated 6 May 1994 ('the DOE'), the development agreement dated 14 June 1994 ('the DA') and the deed of variation dated 24 May 1996 ('the DOV'). Where necessary, the DOE, the DA and the DOV shall be referred to collectively as 'the agreements'. The parties to the agreements are the deceased and Jeff on the one part (as landowners — see para 19 below) and FDR on the other part.

Suit 123

[21] The reliefs sought in Suit 123 are as follows:

(a) a declaration that 'the Commercial Land' portion is not transferrable to (FDR) under the agreements;

(b) a declaration that the order of the court dated 10 October 2016 ordering the transfer of the land is ultra vires the terms of the agreements;

(c) an order that the said court order dated 10 October 2016 be varied or otherwise rectified to the effect that the order to transfer be limited to transfer of the 'Residential Land' portion;

(d) a declaration that the DA and DOV had been validly terminated;

(e) alternatively, a declaration that the specific performance of the DOE and/or the DA and/or the DOV had been frustrated and unenforceable;

(f) damages for breach of the DOE and/or the DA and/or the DOV to be assessed by the court;

(g) statutory interest at the rate of 5%pa on damages calculated from the date of assessment of damages to the full settlement; and

(h) costs.

BACKGROUND

[22] The deceased and Jeff ('the landowners') co-owned the land held under Country Lease No 215012847 at Mile 7, Jalan Putatan, Putatan in the District of Penampang, Sabah measuring approximately 4.250 acres ('the land') out of which 1.8 acres had been approved for commercial development ('the

commercial land') and the balance, for residential development ('the residential land'). The landowners had executed the agreements with FDR.

[23] The agreements were the subject matter of Suit 92. Pursuant to the DOE, the landowners had agreed to transfer the residential land to FDR. As consideration, the landowners agreed to accept four units of houses in a housing project (Taman Union) which was developed by FDR. The four units of houses in Taman Union were completed and transferred to the deceased and Jeff, or their nominees. However, the deceased and Jeff continued to remain as the registered owners of the entire parcel of land, including the residential land. Thus, the landowners did not honour their part of the bargain per the DOE.

[24] By way of the DA, the landowners assigned the commercial land to FDR and in exchange, they agreed to accept two intermediate shop lots ('the vendors' lots') from FDR. Subsequent thereto and by virtue of the DOV, three shop lots instead of two, were allocated to the landowners. However, the deceased and Jeff (as the landowners) failed to deliver vacant possession of the commercial land as part of the land was occupied by the Shi Tai Tze family.

[25] In the meantime, pursuant to a power of attorney which had been granted by the landowners, FDR charged the land to Hock Thai Finance Corporation Bhd ('Hock Thai Finance') as security for a bridging loan to be utilised by FDR to develop the land. After considerable delay and related legal proceedings, FDR was eventually given vacant possession of the land on 16 June 2010.

[26] Despite the fact that vacant possession of the land had not been given to FDR timeously, they had nevertheless (in 1999) completed the construction (save for the wiring) of Lot 1 to Lot 12 of the shoplots on the commercial land. These included the vendors' shop lots, namely Lots 8, 9 and 10.

[27] In the meanwhile, and as a result of the delay in the handing over of vacant possession of the land, FDR was unable to service the bridging loan which Public Bank Bhd had taken over from Hock Thai Finance. As a result, FDR was wound up due to their inability to pay their debt owing to Public Bank Bhd.

[28] Subsequent to FDR's winding up in 2004, Albert and Jeff agreed to sell the land to one Kurnia Pasifik Sdn Bhd ('Kurnia Pasifik'). They did this without terminating the DOE, DA and the DOV. The sale and purchase agreement ('the 2005 agreement') was signed by Mutual Advantage as purchaser and nominee of Kurnia Pasifik on the one part and by Albert and Jeff on the other part.

[29] However, Albert denied having entered into the 2005 agreement and claimed that his signature had been forged. Albert lodged a caveat, but it was removed upon the application of FDR/March Advantage.

[30] Subsequently it was discovered that a *Jadual Tiga* had been granted on 22 December 2011 for Frankey to be the administrator of the estate of the deceased. The title to the land in the meantime was retained by the fifth defendant pending resolution of the dispute between the parties.

[31] Sometime in 2012, one half of the share of the land was registered in Frankey's name by the fifth defendant. Thereafter the first to the fourth defendants (in Suit 92) offered to sell the land to third parties and had collected advances. FDR and March Advantage filed Suit 92 for breach of the agreements, breach of trust and conspiracy to defraud and sought, inter alia, declarations that they have a right to the land in question. They sought specific performance of the agreements and the transfer of the land in question as well as damages.

[32] In Suit 92, FDR contended that pursuant to the agreements and the fulfilment of its part of the bargain, it had obtained 'beneficial ownership' of the land that was registered in the names of Frankey and Jeff. It was further contended that by virtue of the agreements and the fact that the consideration for the land ie, the four houses in Taman Union had been transferred to the landowners or the successors-in-title of the deceased or their nominee, and that the vendors' lots had been constructed, Frankey and Jeff had become 'bare trustees' of the land. March Advantage withdrew its claim under the 2005 agreement and sought instead rescission of the 2005 agreement.

[33] By way of a counterclaim, Jeff pleaded, inter alia, that he had been induced into signing the agreements, that the 2005 agreement was a sham and sought declarations to that effect and for damages for failure to deliver the shop lots within the specified time.

[34] After a full trial, the High Court on 10 October 2016, granted judgment in favour of FDR and March Advantage.

[35] The High Court's ruling may be summarised as follows:

(a) the deceased or his successor-in-title and Jeff have become bare trustees of the entire land in question by virtue of the agreements. There is no evidence that FDR had abandoned the agreements;

(b) the plea of limitation that was raised by the defendants in Suit 92 was rejected;

(c) the High Court held that Albert, Frankey and Jeff were in breach of the agreements in failing to give vacant possession and this state of affairs continued until 16 June 2010 when eviction proceedings (against the Shi Tai Tze family) were finally successful;

(d) FDR's action (Suit 92) which was commenced in August, 2013 was within the limitation period and the court was not prevented from granting the relief of specific performance as prayed for;

(e) the High Court held that the half share of the land in question was not listed as an asset of the estate of the deceased in the first place when Albert applied for the *Jadual Tiga* in 2001. Hence, the *Jadual Tiga* that was issued to Albert in 2005 and to Frankey in 2011 are nullities for being in contravention of s 5 of the Administration of Native and Small Estates Ordinance 1941;

(f) further, the High Court ruled that the half share that Frankey had inherited from the deceased is subject to an order of specific performance as well;

(g) as for damages, the High Court held that in view of the fact that the buyers of the five units of shop lots have not sought to claim liquidated and ascertained damages ('LAD') from FDR, the claim for LAD is without basis;

(h) the High Court also ordered Jeff to refund the sum of RM140,000 to March Advantage. The High Court also ordered that the sum of RM460,000 which was held by the solicitor who acted as stakeholder, be refunded to March Advantage. The High Court came to these conclusions in view of the fact that Jeff had (during the trial) taken the position that the 2005 agreement is not valid and also March Advantage elected not to rely on the 2005 agreement on the ground that it is a nullity as Albert and Jeff did not own the land at the material time; and

(i) the High Court held that there is no merit in Jeff's counterclaim against FDR for various declarations including for rescission of the agreements and in the alternative for a declaration that the agreements had been determined for failure to deliver the shop lots within 36 months since the DA clearly provided that the right of the landowners in the event of late delivery is a claim for LAD only and that the right of FDR to deal with the land under the powers of attorney is unaffected.

[36] The orders made by the High Court in Suit 92 (in verbatim) were as follows:

(a) declaration that deed of exchange dated the 6 of May 1994, the development agreement dated the 14 June 1994 and deed of variation dated the 24 May 1996 between the fourth defendant and the late Louis

Leong Kui Yung and the first plaintiff in respect of the said land held under Country Lease No 215012847 are valid, binding and enforceable;

(b) a declaration that the first plaintiff is the beneficial owner of the said land held under Country Lease No 215012847 measuring 4.250 acres more or less and situate at Putatan in the District of Penampang, Sabah together with the development and improvements completed thereon subject to the interest of the fourth defendant and the estate of the late Louis Leong Kui Yung in the completed shoplots in Lots 8, 9 and 10 pursuant to the deed of exchange dated 6 of May 1994, development agreement dated 14 June 1994 and deed of variation dated 24 May 1996 between the fourth defendant and the late Louis Leong Kui Yung and the first plaintiff;

(c) an order that the fourth defendant and third defendant as the successor-in-title to the late Louis Leong Kui Yung's one-half (1/2) share in the said land do forthwith sign the memorandum of transfer of the said land held in Country Lease No 215012847 and other relevant transfer documents to enable the first plaintiff to effect transfer of the said land measuring an area of 4.250 acres held in Country Lease No 215012847 to the first plaintiff subject to the interest of the defendant and the estate of the late Louis Leong Kui Yung in the completed shoplots in Lots 8, 9 and 10 pursuant to the development agreement dated 14 June 1994 and the deed of variation dated the 25 of May 1996 within 30 days failing which the senior assistant registrar shall execute the relevant documents to effect the said transfer;

(d) a declaration that the fifth defendant shall give effect to the above orders;

(e) a declaration that the agreement dated 30 October 2005 is rescinded;

(f) the fourth defendant is ordered to refund and return the sum of RM140,000 to the second plaintiff and interest of 5%pa on the said sum of RM140,000 from the date of the judgment to the date of full payment;

(g) a declaration that the balance of the sum of RM460,000 held by the stakeholder solicitor under the 2005 Agreement to be refunded to the second plaintiff;

(h) the counterclaim of the fourth defendant is dismissed with costs; and

(i) the first to third defendants to pay costs of RM50,000 to the plaintiffs. The fourth defendant to pay costs of RM50,000 to the plaintiffs.

FDR's application to strike out (Suit 123)

[37] FDR's application to strike out Suit 123 was predicated on the fact that the SOC and reliefs claimed pertain to the agreements and the land which was the subject matter of Suit 92 and that this was an attempt at litigating on the same or substantially the same questions and/or issues. It was contended that the High Court's ruling in Suit 92 binds the parties or their privies. Essentially, FDR's position is that the SOC and the action is barred by the doctrine of res

judicata in the narrow and wider sense and that it is without any reasonable cause of action and/or is frivolous and vexatious and/or is an abuse of the process.

[38] According to FDR, by reason of the doctrine of res judicata in the narrow and wider sense, Frankey is precluded from raising or re-litigating the same or substantially the same or similar cause(s) of action and/or issues and/or questions and/or relief which were fully litigated and conclusively determined by the High Court in Suit 92 and which was conclusively affirmed by Court of Appeal in Civil Appeal No S-02(W)-2046–11 of 2016.

[39] In the affidavit that was filed by Wong Kuong Chung (affirmed on 21 December 2018) in support of FDR's application to strike out, the deponent averred (sans any reference to the exhibits) as follows:

> 4. I aver that the Plaintiff's Statement of Claim and relief claimed in this action relate to the deed of exchange dated 06 May 1994, the Development Agreement dated 14.06.1994 and the Deed of Variation dated 24 May 1996 in respect of the said land which were the same subject matters involved in the previous Civil Suit No BKI-22-92/8 of 2013 involving the same or substantially the same questions, issues and litigants.
>
> 5. I was advised by the Solicitors and verify believe that the Plaintiff's Statement of Claim and action herein is without any reasonable cause of action and/or is frivolous and vexatious and/or is an abuse of the process of the Court since in the Plaintiff's action and the claim herein, the Plaintiff raised and attempted to re-litigate the same or substantial [sic] the same or similar cause of action and/or issues and/or questions and/or relief which were fully litigated and conclusively determined by the High Court to a final decision in Civil Suit No BKI-22-92/8 of 2013 and were conclusively affirmed by Court of Appeal in Civil Appeal No S-02(W)-2046-11/2016.
>
> 6. In the aforesaid premises, I was advised by the Solicitors and verily believe that the Plaintiff was barred by the doctrine of res judicata from re-litigating the same or similar matters and issues in this action. Further, the Plaintiff was estopped from disputing and questioning such decisions on the merits conclusively and finally decided in the Judgment of the High Court in Civil Suit No BKI-22-92/8 of 2013 involving the same subject matters, issues, questions and the same parties.
>
> 7. I aver that in Civil Suit No BKI-22-92/8 of 2013 taken out by the Defendant as the first plaintiff and another on 05.08.2013, the High Court has adjudged and ordered on 10 October 2016 after a full trial ('the Judgment'), inter alia, declaring that the Defendant is the beneficial owner of the subject land formerly held in Country Lease No 215012847 and now held in Country Lease No 265012842 situate in the District of Putatan, Sabah together with the commercial development and improvement completed thereon ('the said land'): see Order (1) of the Judgment.
>
> 8. In Civil Suit No BKI-22-92/8 of 2013, the Plaintiff was named as the third

defendant being sued as the administrator of the estate of Louis Leong Kui Yung (Deceased) and in his personal capacity. The other Defendants included Albert Leong as the first defendant and Jeff Leong as the fourth defendant. Louis Leong Kui Yung and Jeff Leong were at all material times the registered owners of the said land ('the owners').

9. During the proceedings in Civil Suit No BKI-22-92/8 of 2013, the Plaintiff had held himself out as the administrator of the estate of the late Louis Leong Kui Yung (Deceased) in respect of one-half (1/2) share in the said land purported relying on *Jadual Tiga* [*sic*] issued by Penampang Native Court in 2011 in Application No MAN.208/01 ('the said *Jadual Tiga*').

10. In the Judgment in Civil Suit No. BKI-22-92/8 of 2013, the learned High Court Judge has found and decided on the merits on the following matters and issues after the full trial: -

(1) That the said *Jadual Tiga* relied on by the Plaintiff which was issued by Penampang Native Court in 2011 was a nullity for want of jurisdiction as shown in page 35 of the Judgment;

(2) That 'Louis Leong and Jeff Leong had become bare trustees in respect of the residential land upon transfer of the four (4) units of the houses at Taman Union to them or their nominees' as shown in page 20 of Grounds of Judgment.

(3) That 'Louis Leong and Jeff Leong assigned all interest in the remaining portion of the land which is referred to as the commercial land to the Defendant' as shown in page 20 of Grounds of Judgment.

(4) That 'Under the terms of the deed of exchange, Louis Leong and Jeff Leong had clearly divested all proprietary interest in the eastern part of the land in question as demarcated in the locality plan that was attached as shown in page 21 of Grounds of Judgment;

(5) That 'Louis Leong or his successors in title and Jeff Leong have become bare trustees of the entire land in question by virtue of the deed of exchange, The Development Agreement and the Deed of Variation as shown in page 23 of the Grounds of Judgment.'

(6) 'Louis Leong and Jeff Leong had completely divested themselves of the entire subject land in question' as shown in page 23 of Grounds of Judgment.

(7) 'Louis Leong and Jeff Leong had become bare trustees of the land subject only to their right to the completed vendors' lots' as shown in page 23 of Grounds of Judgment.

11. By reason of the aforesaid decisions in the Judgment, I was advised by the Solicitors and verily believe that that the Plaintiff who was the successor in title of the estate of Louis Leong Kui Yung was holding the one-half share in the said land comprising the residential land and the commercial land as bare trustee for the Defendant as finally and conclusively decided in the Judgment in Civil Suit No BKI-22-92/8 of 2013.

12. Dissatisfied with the Judgment, the Plaintiff and Jeff Leong who was the fourth defendant in Civil Suit No BKI-22-92/8 of 2013 appealed against the whole of the Judgment to the Court of Appeal in two appeals.

13. On 25.07.2017, Jeff Leong withdrew his appeal to the Court of Appeal in Civil Appeal No S-02(W)-2141–11 of 2016.

14. On 28.07.2017, Court of Appeal dismissed the appeal of the Plaintiff in Civil Appeal No S-02(W)-2046-11/2016 with costs of RM15,600 and affirmed the whole of the Judgment of the learned High Court Judge.

15. Upon the dismissal of the Plaintiff's appeal by the Court of Appeal, there was no application for leave to appeal to the Federal Court.

16. In the aforesaid premises, I aver that the Judgment conclusively decided and pronounced by the High Court in Civil Suit No BKI-22-92/8 of 2013is the final judgment binding upon and enforceable against the Plaintiff.

17. Despite the Judgment which is the final decision of the Court and the demands in writing, the Plaintiff disobeyed Order (3) the Judgment in refusing to sign the memorandum of transfer of the said land.

18. In Civil Appeal No S-03(IM)-49-05/2018, the Plaintiff's appeal against the decision of the learned High Court Judge allowing the Defendant's appeal in respect of the execution of Order (3) of the Judgment was dismissed by Court of Appeal with costs of RM3,000 to the Defendant.

19. By reason of the persistent and contumelious disobedience of the Judgment by the Plaintiff, I aver that the commencement of another fresh action herein by the Plaintiff is tainted with bad faith to prolong the litigation and frustrate the fruit of the Judgment obtained by the Defendant in Civil Suit No. BKI-22-92/8 of 2013.

20. In the said premises, I aver that this fresh action of the Plaintiff is clearly an abuse of the process of the Court because this fresh action is an attempt by the Plaintiff to re-litigate the same or substantially the same issues and questions on the same subject matters between the same parties which had been conclusively and finally decided in the Judgment in Civil Suit No BKI-22-92/8 of 2013 and affirmed by Court of Appeal.

21. I aver that the said land was divided into two (2) parts described as 'the residential land' of the one part which was the subject matter under the deed of exchange dated 06 May 1994 and 'the commercial land' of the other part being the subject matter of the Development Agreement dated 14.06.1994 and the Deed of Variation dated 24 May 1996: see pages 3 to 4 of the Grounds of Judgment in Civil Suit No BKI-22-92/8 of 2013.

22. Under the deed of exchange, Louis Leong Kui Yung and Jeff Leong as the owners of the said land had agreed to transfer the residential land to the Defendant in exchange for four (4) units of terraced houses at Taman Union allocated by the Defendant which were accepted by the owners who had taken possession of the said houses in 1994 and had taken the transfer of the said houses in 1996 and 1997: see pages 3 to 4 of the Grounds of Judgment in Civil Suit No BKI-22-92/8 of 2013.

23. Under the Development Agreement, the owners had assigned to the Defendant

the commercial land for the development of shoplots in consideration of two (2) shoplots to be built by the Defendant for the owners.

24. Under the Deed of Variation, the owners and the Defendant had mutually agreed, inter alia, that three (3) shoplots to be allocated to the owners in Lot 8, 9 and 10 ('the Vendors' lots') instead of two (2) intermediate shoplots under the Development Agreement.

25. Despite the breach of the owners in failing to deliver vacant possession of the said land to the Defendant until sometime on or about 16.06.2010, the Defendant completed the Vendors' lots in 1999.

26. Therefore, the subject land involved in Civil Suit No. BKI-22- 92/8 of 2013 is the whole of the said land comprising the residential land and the commercial land.

27. I aver that in the Judgment, the learned High Court Judge has nullified the transfer of the one-half (1/2) share of the said land to the Plaintiff and has further ordered the Plaintiff to transfer the said one-half (1/2) share to the Defendant as the beneficial owner of the said land.

28. Therefore, Louis Leong Kui Yung who had no proprietary interest in the said land was holding the said land together with Jeff Leong as bare trustees for the Defendant as the beneficial owner of the said land and that the estate of the late Louis Leong Kui Yung or the Plaintiff purportedly as successor in title and administrator was not entitled to the beneficial interest and title in the said land or the one-half share thereof or one- half share in the commercial land.

29. By reason of the matters aforesaid, the Plaintiff was not entitled to be issued with any Jadual Tiga or the Jadual Tiga dated 18 October 2018 in respect of one-half share in the said land or the commercial land upon the demise of the late Louis Leong Kui Yung.

30. I aver that if, which is denied, the Plaintiff was the successor in title or administrator of the estate of the late Louis Leong Kui Yung, the Plaintiff was holding one-half share in the said land or the commercial land as bare trustee for the Defendant.

31. I deny the alleged abandonment and/or breach of the Development Agreement and/or the Deed of Variation or the alleged breach of the deed of exchange or the alleged fraud or impropriety in respect of the sale and purchase agreement dated 31 October 2005 which was declared to be rescinded in the Judgment in Civil Suit No BKI-22-92/8 of 2013. In any event, I aver that these matters and allegations had been litigated and conclusively decided in the Judgment in Civil Suit No BKI-22-92/8 of 2013.

[40] In opposing encl 6, Frankey affirmed an affidavit on 10 January 2019 and averred as follows:

3. I have been advised by my Solicitor and I verily believe that the Defendant's Notice of Application is based on the following grounds:

(1) *First Ground*: My Statement of Claim is without reasonable cause of action and/or frivolous and vexatious and/or an abuse of the process of the court

because I raised and attempted to re-litigate the same or substantially the same or similar cause of action and/or issues and/or questions and/or relief which were fully litigated and conclusively determined by the High Court to a final decision in Civil Suit No BKI-22-92/8 of 2013. [*See: Para 5 of Encl 7*]

(2) The Defendant thus says that I am estopped from disputing and questioning such decisions on the merits conclusively and finally decided in the judgment in Suit No BKI-22-92/8 of 2013. [*See: Para 6 of Encl 7*] In opposition to Encl 6 and in reply to Encl 7, I have been duly advised by my Solicitors and I verily believe and say as follows:

(a) At the hearing of Encl 6, my Solicitors shall refer this Honourable Court to my Further Amended Statement of Defence dated 11.02.2016 in the said Suit No BKI-22-92/8 of 2013 to refute the above allegation of the Defendant. A copy of my Further Amended Statement of Defence dated 11.02.2016 is now produced and shown to me marked as 'FL-1'.

(b) Ex FL-1 will show that I did not even have a counterclaim against the Defendant in the said Suit No BKI-22-92/8 of 2013.

(c) My Solicitors shall, relying on my Statement of Claim in this action, which is now produced and shown to me marked as 'FL-2', explain to this Honourable Court that the allegations of the Defendant as contained in Encl 7 is baseless.

(3) Second Ground: The High Court had in the said Suit No BKI-22-92/8 of 2013, on 10 October 2016, declared that the Defendant is the beneficial owner of the subject land held under CL No 215012847, now held under CL No 265012842. [See: para 7 of Encl 7] In opposing Encl 6 and in reply to Encl 7 I have been advised by my Solicitors and I verily believe and say that:

(a) I agree that the Defendant is the beneficial owner of the Residential Area of the said subject land.

(b) I disagree that the Defendant is the beneficial owner of the Commercial Area when any such declaration by the Court is contrary to the express terms and conditions of the Development Agreement dated 14 June 1994, the Deed of Variation dated 24 May 1996 and the deed of exchange dated 6 May 1994 is therefore unlawful.

(c) I disagree that the commercial development and improvement were completed on the said subject land when the Defendant cannot prove such allegation by producing a copy of the Occupation Certificate to the effect.

(d) I have been advised and I verily believe that my current action deals with distinct issues of fundamental breaches of the Development Agreement dated 14 June 1994 and the Deed of Variation dated 24 May 1995 including the deed of exchange dated 6 May 1994 as

pleaded in Paragraph 22 of my Statement of Claim, Encl. 1 herein.

(e) By reasons of the aforesaid fundamental breaches, I have duly terminated the said Development Agreement and the Deed of Variation by Notice in Writing through my Solicitors dated 5.11.2018 and there was no Counterclaim in this action to challenge such termination. A copy of the said Notice of Termination is now produced and shown to me marked as 'FL-3'.

(4) Third Ground: that I was holding the half share of the Residential Area and Commercial Area of the said subject land as trustee for the Defendant as finally and conclusively decided in the judgment in the said Suit No BKI-22-92/8 of 2013. [See: para 11 of Encl. 7] In opposing Encl 6 and in reply to Encl 7, I have been verily advised by my Solicitors and I verily believe and say that:

(a) Any decision of any Court against and contrary to the express terms and conditions of the Development Agreement dated 14 June 1994, the Deed of Variation dated 24 May 1996 and Deed of Exchange dated 6 May 1994 is unlawful. A copy each of these agreement and deeds are now produced and shown to me marked as 'FL-4', FL-5' and 'FL-6' respectively.

(b) I am able to affirm and say that under the express terms and conditions of the Development Agreement dated 14 June 1994, the Deed of Variation dated 24 May 1996 and Deed of Exchange dated 6 May 1994, there was no provision for the transfer of the Commercial Area of the said subject Land from the Estate of Leong Kui Yung, deceased, to the Defendant.

(c) I repeat that the Development Agreement dated 14 June 1994, the Deed of Variation dated 24 May 1996 and Deed of Exchange dated 6 May 1994 had been duly terminated and there was no challenge to the said termination.

(5) Fourth Ground: I was not entitled to be issued with the Jadual Tiga dated 18 October 2018 in respect of the Commercial Area of the said subject land. [*See: para 29 and 30 of Encl. 7*] In opposing Encl. 6 and in reply to Encl 7, I have been duly advised by my Solicitors and I verily believe and say as follows:

(a) The Jadual Tiga dated 18 October 2018 was lawfully issued to me by the Native Court of Penampang.

(b) I have advised by my Solicitors and I verily believe that the Defendant is blowing hot and cold in that while asking the Court in the said Suit No. BKI-22-92/8 of 2013 to declare my former Jadual Tiga as null and void *ab initio* and declared the transfer of the Residential Area of the said subject land to me as null and void, but here in this action alleges that I had fully represented the Estate of Louis Leong Kui Yung, deceased, in the said Suit No. BKI-22- 92/8 of 2013 as successor of the Estate Louis Leong Kui Yung, deceased.

(c) I have therefore been duly advised by my Solicitors and I verily believe that since my former Jadual Tiga had been declared as null and void ab initio, the Estate of Louis Leong Kui Yung, deceased had never been involved in the said Suit No. BKI-22-92/8 of 2013.

4. In reply to Para 31 of Encl. 7, reference to the sale and purchase agreement dated 31 October 2005 in my Statement of Claim in this action is stated in Paragraph 15 of my Statement of Claim, which is self-explanatory and para 31 of Encl. 7 is baseless.

5. By reasons of the matters aforesaid, I have been duly advised by my Solicitors and I verily believe that the Defendant's Notice of Application is baseless, I have a cause of action against the Defendant and my Statement of Claim is not frivolous, vexatious and/or an abuse of the process of the Court. I am able to affirm that the Estate of Louis Leong Kui Yung, deceased, had never been legally represented in any suit or action. This action was lawfully commenced by me as Administrator of the Estate of Louis Leong Kui Yung, deceased, when I was appointed lawfully by the Native Court of Penampang, Sabah as administrator of the said Estate on 18 October 2018. I further say that the Estate of Louis Leong Kui Yung, deceased had lawfully terminated the Development Agreement dated 14 June 1994, the Deed of Variation dated 24 May 1996 and Deed of Exchange dated 6 May 1994 and there was no challenge to such termination.

[41] It was submitted for FDR that Suit 123 was barred on the ground of res judicata as the judgment in Suit 92 had already conclusively decided the issues which had previously been raised in that action and which had been upheld on appeal by the Court of Appeal. Contrary to Frankey's assertion, FDR denied that only the residential land was the subject matter in Suit 92.

[42] According to FDR, the judgment of the High Court in Suit 92 encompassed the residential land as well as the Commercial Land.

[43] FDR's position is that the landowners were holding the land as bare trustees for FDR as beneficial owners, and that the estate of the deceased or Frankey purportedly as successor-in-title and administrator, were not entitled to the beneficial interest and title in the land or the one-half share thereof or one-half share in the commercial land as alleged. With regards to the allegation that FDR had charged the land to the banks, FDR states that the landowners did not at any time object to the bridging loan which was obtained for the purpose of completing the development on the commercial land.

THE JC'S GROUNDS

[44] In dealing with FDR's application to strike out Suit 123, the JC examined all the relevant circumstances and concerning Suit 92 including the grounds of judgment. The JC observed as follows:

[42] Thus, it can be seen that in the present case, the plaintiff was indeed privy in interest and in blood by virtue of the fact that the plaintiff had held himself to be an administrator of the Estate of the deceased and that he was the deceased' son and therefore a beneficiary to the Estate. Further, the plaintiff who was sued as the Administrator of the Estate of the deceased and in his personal capacity in the 2013 Suit, also testified as one of the witnesses during the trial of the action.

[43] This brought me to the other point raised by the learned counsel for the plaintiff that there was no counterclaim by the plaintiff in the 2013 Suit and that therefore the prayers sought for in the present action could not have been sought for in the 2013 Suit.

[44] With respect, this argument completely ignored the wider principle of res judicata which, save for special circumstances, bars the same parties from litigating issues or facts which could and/or ought to have been raised in the earlier proceedings. A clear example can be seen in prayer (1) in this action wherein the plaintiff sought for a declaration that the commercial land was not transferrable to the defendant under the agreements. However, it is noted that in the 2013 Suit, the defendant herein had already, inter alia, prayed for an order that the fourth defendant and the plaintiff forthwith sign the memorandum of transfer of the commercial land and other relevant transfer documents to enable the defendant to effect transfer of the commercial land to the defendant (see prayer 3G). Thus, the plaintiff could and/ought to have brought a counterclaim on the very same issue in the 2013 Suit.

[45] Similarly, the plaintiff had pleaded matters or facts which allegedly were unknown to him and/or only unveiled to him during the trial of the 2013 Suit or upon his further investigation. These included the allegation that the plaintiff was not privy to the agreements and that it was only by reason that the court in the 2013 Suit had declared the agreements as valid that the Estate of the deceased had the right to deal with the agreements. Thus, it was contended that these issues could not have been raised in the 2013 Suit.

[46] I found no merits in the plaintiff's contention. The allegation that the plaintiff was allegedly not privy to the agreements had in fact already been raised in the 2013 Suit — see paragraph 5A(b) of the Further Amended Statement of Defence wherein it was pleaded as follows:

> 5A. Notwithstanding Paragraph 5 above, the first Plaintiff had no cause of action against the 1st, 2nd and third Defendants in respect of the deed of exchange dated 06 May 1994 by reasons of the fact and law that:
>
> ...
>
> (b) the Defendants were and are at all material times, not privy to the said Deed of Exchange dated 06 May 1994 ...

[47] Furthermore, the High Court in the 2013 Suit has made a specific finding that the plaintiff's registered half share in the Land was subject to the terms of the agreement. His Lordship Ravinthran Paramaguru J stated as follows (see exh 'W3'):

> If it were otherwise, in my opinion, the transfer of the half share of Louis Leong to Frankey Leong by the Native Court does not disentitle the first plaintiff from

pursuing the remedy of specific performance as Frankey Leong cannot have a better right to the land than Louis Leong. Even if Louis Leong was alive, his registered ownership of half share of the land would still be subject to the lawful contractual bargain that he entered via the deed of exchange, the Development Agreement and the Deed of Variation.

In the premises, Frankey Leong who inherited the half share registered ownership from his father is subject to the same contractual bargain.

[48] Likewise, I also found that the plaintiff's complaints about the alleged fundamental breaches of the agreements by the Defendant had either been raised and/or could have been raised in the 2013 Suit. For instance, the allegation that the Defendant had failed to complete and handover possession of the Landowners' shophouses had in fact been addressed by the High Court in the 2013 Suit in the following manner:

... I also find that the argument that the first plaintiff had breached the Development Agreement for failing to deliver the completed shop houses within 36 months to be without any merit as it was Louis Leong and Jeff Leong who had failed to deliver vacant possession for the development project to be completed.

[49] The same can be also said about the plaintiff's allegation that the defendant had allegedly unlawfully charged the land for various loans and banking facilities in breach of the DA. It is noted that the defendant had in paragraph 9 of its amended statement of claim in the 2013 Suit alluded to the charge of the Land to Hock Thai Finance Corporation Berhad as a security for a bridging loan. If indeed this was unlawful, the defendants in the 2013 Suit could and/ought to have raised the issue therein. As the defendants did not do so then, the plaintiff cannot now attempt to raise it as an issue in this action. It is trite that parties are not entitled to litigate their case by piecemeal.

[45] In her grounds of judgment, the JC also noted the following and then concluded:

[54] In addition, from the judgment of the High Court in the 2013 Suit, it can be seen that the learned High Court judge had considered the factual matrix of the case before coming to the conclusion that the landowners had clearly divested all proprietary rights in the commercial land upon the defendant having fulfilled their obligation under the DA ie to hand over three shop lots to them. His Lordship stated that:

Thus it is clear from the terms of the development agreement that Louis Leong and Jeff Leong had completely divested themselves of the entire subject land in question. For all the above reasons, I find that Louis Leong and Jeff Leong had become bare trustees of the land subject only to their right to the completed vendors' lots.

[55] While it is true that the DA is silent as to the transfer of the Commercial Land, cl 1 of the DA does provide that:

In consideration of the developers developing the 'said Commercial Land' by

constructing at their own cost commercial shophouses thereon the land owners agree that all the Shophouses constructed thereon EXCEPT two intermediate units (hereinafter referred to as 'the Land Owner's shophouses') shall be assigned or transferred to the Developer without further cost.

[56] The plaintiff's contention, if accepted, would mean that the landowners would have continued being the owners of the commercial land despite having already gotten their contractual entitlement under the DA and notwithstanding the defendant being the owner of the rest of the shophouses on the very land. With respect, this would lead to absurdity and more importantly, against the evidence that was led in the trial of the 2013 Suit namely that the landowners themselves agreed that they had no more interest in the land save for the three shoplots.

[57] To my mind, given cl 1 of the DA and given the learned High Court judge's finding that the landowners have all divested their proprietary rights over the Land, there was nothing illegal in the granting of the declaration that the defendant was the beneficial owner of the land and pursuant thereto, the order for the transfer of the commercial land to the defendant — see *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd Bhd* [1996] 2 MLJ 12 and *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193.

[58] While on this issue, it did not escape this court's attention that although it was not expressly pleaded, the effect of prayers (2) and (3) of the plaintiff's statement of claim herein was in fact, to impeach part of the judgment of the High Court in the 2013 Suit. As decided by the Federal Court in *Hock Hua Bank Bhd v Sahari Bin Murid* [1981] 1 MLJ 143, a fresh action may lie to impeach an impugned original judgment only if the judgment or order can be shown to have been obtained by fraud or where further evidence which could not been possibly have been adduced in the original hearing is forthcoming. It was not part of the plaintiff's pleaded case that the judgment in the 2013 Suit was obtained by fraud. As for the alleged new discoveries pleaded in paras 16 to 18 of the statement of claim, there were no averments to support why they could not have been found out with due diligence before the trial of the 2013 Suit.

Conclusion

[59] Given this court's finding that the plaintiff's claim herein was caught by the doctrine of *res judicata*, it was plain and obvious that the plaintiff's action was unsustainable and liable to be struck out under Order 18 rule 19(1)(a), (1)(b) and/or (1)(d) of the ROC 2012.

[46] Before us, counsel for Frankey attacked the JC's findings and conclusions as being flawed. It was contended (per the memorandum of appeal) that the JC:

(a) failed to give a proper appreciation of the fact that in Civil Suit No BKI-22–92/8 of 2013, the appellant was sued as a defendant who had inherited half divided share of the land (ie, the 'residential area') held under CL No 215012847 by virtue of a Jadual Tiga dated 22 December

2011 as null and void since the said land held under CL No 215012847 was not even referred to in the said Jadual Tiga dated 22 December 2011;

(b) failed to take into consideration that the subject matter in Civil Suit No BKI-22–92/8 of 2013, involved the half share of the aforesaid land held under CL No 215012847 inherited by the appellant which was demarcated as 'Residential Area' and the subject matter of the appellant's action herein is in respect of the 'Commercial Area' of the said land, the subject matter in the development agreement dated 14 June 1994 and deed of variation dated 24 May 1996;

(c) failed to take into consideration and take proper appreciation of the fact that the appellant had been lawfully granted a Jadual Tiga by the Penampang Native Court on 18 October 2018 in respect of the said land held under CL No 215012847 and by virtue thereof the appellant brought this action as Administrator of the Estate of Leong Kui Yung, deceased, for the first time; and

(d) failed to take into consideration that Leong Kui Yung, deceased, was a contracting party under the deed of exchange dated 6 May 1994, the development agreement dated 14 June 1994 and deed of variation dated 24 May 1996 and therefore the appellant as administrator of the estate of the said Leong Kui Yung, deceased is entitled to commence this action for an on behalf of the said estate in respect of the interest and benefit of the estate in the said deed of exchange dated 6 May 1994, the development agreement dated 14 June 1994 and deed of variation dated 24 May 1996.

[47] In para 5 of the SOC Frankey asserted that he obtained another *Jadual Tiga* on 18 October 2018. FDR emphasised that this occurred more than two years after the final judgment in Suit 92 and more than a year after the Court of Appeal dismissed Frankey's appeal via Civil Appeal No S-02(W)-2141–11 of 2016.

[48] It was submitted for FDR that Frankey was not entitled to be issued with any *Jadual Tiga* or the *Jadual Tiga* dated 18 October 2018 in respect of the one-half (1/2) share in the land or the Commercial Land upon the demise of the deceased as the High Court in Suit 92 had finally and conclusively decided per the judgment that Jeff and the deceased (*and his successor in title including Frankey*) had no proprietary interest in the land and that they are holding the land as trustees for FDR, the beneficial owner of the land.

[49] In amplification it was submitted that at any rate, even if Frankey was the successor in title or administrator of the estate of the deceased, he was merely holding one-half (1/2) share in the land or the commercial land as 'bare trustee' for FDR and he could get no better title or entitlement to the 1/2 share than what the deceased was entitled to.

[50] Essentially, it was submitted that Frankey's claim over the 1/2 share was defeated by the rule in common law known as *nemo dat quod non habet* or the *nemo dat* rule. The *nemo dat* rule literally means 'no-one can transfer what he has not got'. Essentially, FDR contended that pursuant to the *nemo dat* rule, the deceased had no legal right or entitlement over the 1/2 share in the land or the Commercial Land as the deceased together with Jeff were bare trustees for FDR. Counsel for FDR relied on the Federal Court's decision in *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188; [2015] 8 CLJ 1173; [2015] 3 MLRA 652; [2015] 4 AMR 31; [2015] AMEJ 775 (FC) in support of the *nemo dat* rule.

[51] On a broader basis, it was submitted that Suit 123 is barred by res judicata in the narrow sense and to the extent that Frankey is relying on matters which could have been but were not raised in Suit 192, then res judicata in the 'wider sense'.

[52] In this regard, counsel for FDR relied on the seminal judgment of Peh Swee Chin SCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 (SC) where he lucidly explained the concept of res judicata, cause of action estoppel, issue estoppel and res judicata in the wider sense.

ANALYSIS AND CONCLUSIONS

[53] The starting point in our analysis is that the agreements are the subject of Suit 123 and were at the very epicentre of Suit 92. Frankey was a party to Suit 92 (in his own personal capacity and as administrator of the estate of the deceased) and he could have, but did not file a counterclaim.

[54] He now says that he is not precluded from filing Suit 123 because he did not file a counterclaim in Suit 92. In our view, Frankey's decision not to file a counterclaim in Suit 92 was plainly, his prerogative. It could only have been an informed and conscious decision on his part not to file a counterclaim. But by not filing a counterclaim in Suit 92, Frankey does not get a second chance to resurrect (via Suit 123) the issues that were raised and adjudicated upon in Suit 92. Further, the doctrine of res judicata in the wider sense would also preclude issues that could have been, but which somehow, were not raised.

[55] In our view, the matters that have been raised in Suit 123 were either raised in Suit 92, or are in any event, matters which could have been but were not raised.

[56] In Suit 123, Frankey has attempted to impugn the High Court's judgment/order dated 10 October 2016 which is to enforce the agreements

against Jeff, Frankey and the estate of the deceased. In Suit 123 (see para 18 above) Frankey, inter alia, seeks to limit the orders made in Suit 92 to the residential land and an order that the agreements have been validly terminated.

[57] In this regard, we think that Suit 123 is barred by res judicata. Here, it is apt to quote Wigram VC in *Henderson v Henderson* (1843) 67 ER 313 where he said '... The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ...'.

[58] The principle of res judicata was restated by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783; [1995] 1 MLRA 611; [1995] 3 AMR 2559 (SC), where Justice Peh Swee Chin explained the concepts of res judicata, cause of action estoppel, issue estoppel and res judicata in the 'wider sense' in the following words (pp 197–199 (MLJ)):

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicature*.
>
> When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*.
>
> The public policy of the law is that it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
>
> Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record.
>
> Since the two doctrines are the same, it is no longer of any practical importance to say that *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.
>
> The starting point ought to be the celebrated passage by Wigram, VC, in the case of *Henderson v Henderson* [1843] 3 Hare 100 at p 115 which is:
>
> > The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

A

It may be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties, a default judgment is different from a final judgment on the merits, the latter is the category to which the judgment in the said originating motion given before the filing of the action as concerned directly herein below belongs. Please see the finer points of law in regard to default judgments from the position of the doctrine of *res judicata* in *Kok Hoong v Leong Cheong Kwang Mines Ltd* [1964] MLJ 49; [1956] 1 LNS 50. We have thus mentioned this question of default judgment in passing as it has sometimes been a small source of confusion to the litigants. To revert to that famous passage set out above, the next step is to state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier.

B

C

Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg. please see s 40 of the Evidence Act 1950, it will be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties.

D

The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the confusion in connection with the famous passage of Wigram, VC which Lord Shaw in *Hoystead v Commissioner of Taxation* [1962] AC 155, 170 spoke of as 'settled law' in the Privy Council.

E

Thus, there are in fact two kinds of *estoppel per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

F

[59] Specifically, on 'cause of action estoppel', Justice Peh Swee Chin opined (pp 198–199 (MLJ)) that:

G

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action ie. the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be re-litigated between the same parties because it is *res judicata*.

H

In order to prevent multiplicity of actions and also in order to protect the underlying rationales of *estoppel per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not either deliberately or due to inadvertence. A few cases below will illustrate the point ...

I

[60] He then explained 'issue estoppel' (pp 199–200 (MLJ)) in the following words:

A On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding.

However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final B judgment in which they, or their privies, were parties.

This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. C

In this respect, we respectfully agree with Peter Gibson J in *Lawdor v Gray* [1984] 3 All ER 345, 350 who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.

D

[61] Finally, on res judicata in the 'wider sense', Justice Peh Swee Chin (pp 200–202 (MLJ)) was of the following view:

It is important to bear in mind the manner in which the issue estoppel operates in E preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such F issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata* ie doctrine of *estoppel per rem judicatum*.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. G It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of *estoppel per rem judicatum*.

It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; H the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of the words in the said famous statement ie '... every point which properly belonged to the subject of I litigation ...' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:

> ... res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it

would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. A

This explanation of Somervell LJ was also quoted with approval in the Privy Council in *Yat Tung Investment Co v Dae Heng Bank & Anor* [1975] AC 581 ...

A word of caution is required about the words of 'exercising reasonable diligence' in the said famous passage. *The words do not, in our view, necessitate a mental exercise of making a finding as to whether there was diligence, or reasonable diligence, in the earlier failure to bring it at the previous trial, the issues which should have been brought in the earlier action and which were not or in asserting all other causes of action arising out of the same facts in the earlier action and which were not.* B C

The *words ought to be understood as a gentle rebuke for the failure aforesaid, ie. despite the fact that the party had the opportunity of bringing forward all such issues or asserting all such causes of action; and the words are not meant to impose a pre-condition for applying the doctrine of res judicata but are meant to say that the said non- bringing of the issues would count in any event irrespective of whether the said failure was or was not deliberate or due to inadvertence or negligence.* Otherwise, the words would have virtually all but destroyed the efficacy of *estoppel per rem judicatum*. (Emphasis added.) D

[62] The other cases that we have considered in the context of FDR's plea of res judicata are the Federal Court's decisions in *Akitek Tenggara Sdn Bhd v Mid Valley Sdn Bhd* [2007] 5 MLJ 697; [2007] 6 CLJ 93; [2007] 5 AMR 453 (FC) and *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 3 CLJ 1; [2018] 2 MLJ 133; [2018] MLJU 32; [2018] 1 AMR 837; [2018] AMEJ 0027 (FC). E F

[63] With the abovementioned principles in mind, it is important to emphasize that in Suit 123, Frankey unmistakably refers to the agreements and the same subject matter as Suit 92. We find that for all intents and purposes, Suit 123 is a 're-litigation' of the same matters and issues which were raised in the Suit 92 which were finally and conclusively decided on the merits in the judgment of the High Court (dated 10 October 2016) and which were later upheld by the Court of Appeal. G

[64] It is clear that via Suit 123, Frankey is attacking the correctness of the judgment in Suit 92 vis a vis the commercial land which was finally decided on the merits by the High Court and later upheld by the Court of Appeal. He is also impugning the agreements. H

[65] For the sake of completeness, we have reproduced the relevant parts of the judgment of the High Court in Suit 92 in order to demonstrate the 're-litigating' aspect of Suit 123. In this regard, it is important to keep in mind Frankey's averments per his affidavit affirmed on 10 January 2019 and to juxtapose his complaints with the judgment in Suit 92. The similarity and I

commonality of the factual matrix, the documents, the legal and factual issues are stark to say the least:

> [15] In this judgment, where necessary, I shall collectively refer to the first to fourth defendants as 'the defendants' as the fifth defendant is merely a nominal defendant for the purpose of enforcing reliefs. The parties did not provide agreed issues for the trial. For sake of convenience, I shall attempt to set down here the gist of the claim and the defence in a nutshell for ease of identification of the main issues in this case.
>
> [16] The first plaintiff's case is that they have beneficial ownership of the land that is currently registered in the name of Frankey Leong (the third defendant) and Jeff Leong (the fourth defendant). The basis of the claim is the three agreements (deed of exchange, the development agreement and the deed of variation) that the first plaintiff executed with Louis Leong and Jeff Leong. The first plaintiff has pleaded that Louis Leong and Jeff Leong had breached the agreement by not giving vacant possession of the so-called 'commercial land' and had thereby caused financial loss.
>
> The first plaintiff pleaded and argued that a constructive trust had come into existence in favour of the first plaintiff in respect of the land by virtue of the said agreements. The plaintiffs also pleaded that the defendants had committed the tort of conspiracy to defraud by lodging caveats or causing caveats to be lodged on the land to prevent its transfer to the second plaintiff. The defendants have denied the existence of constructive trust under the three agreements and have taken the position that even if there was one, the claim is barred by limitation.
>
> The defendants have denied colluding to defraud the plaintiffs. In respect of the claim of the second plaintiff, the counsel for the first to third defendants submitted that it has no locus standi to assert any claim under the deed of exchange, the development agreement and the deed of variation due to the doctrine of privity of contract. In respect of the 2005 agreement, counsel for the first to third defendants submitted that the first defendant did not sign the agreement and that it is not valid. In any event, counsel for first to third defendants submitted that the claim under it is barred by limitation. Counsel for first to third defendants also submitted that the claim against the first defendant as administrator is flawed as he ceased to be the administrator in 2011. Counsel for fourth defendant submitted that the three agreements are indivisible and that the first plaintiff was not contemplated as the beneficial owner in the agreements. He also submitted that Louis Leong and Jeff Leong did not breach the three agreements by failing to give vacant possession as the powers of attorney permitted the first plaintiff to take legal action against the occupant of the 'commercial land'. I shall address the main issues under the following headings.
>
> *Capacity of the first and third defendants as administrators*
>
> [17] Prior to commencement of trial, counsel for plaintiffs amended the writ to sue Albert Leong and Frankey Leong in their capacity as administrators of the estate of Louis Leong. Counsel for the first to third defendants submitted that there can be no cause of action against Albert Leong (the first defendant) as he ceased to be the administrator by the time the writ was filed.
>
> Frankey Leong took over as the administrator in 2011. However, it must be noted that the plaintiffs have sued both the said defendants in their personal capacity as

well as they pleaded that their actions during the time they acted as administrators caused them loss. In the premises, the argument that there is no a cause of action against the said defendants in their personal capacity is without merit. Counsel for first to third defendants argued that the amendment to sue the first and third defendants takes effect only from the date of amendment in 2016.

However, as argued by counsel for plaintiffs, under the doctrine of relation back, an amendment takes effect on the day the original pleading was filed (see *Sio Koon Lin v SB Mehra* [1981] 1 MLJ 225). Thus, on the issue of the capacity, it must be deemed that the first and third defendants are being sued both in their personal capacity and in their capacity as administrators and that it takes effect from the date of the writ.

Beneficial interest and trust

[18] Apart from limitation, this is the main issue in this case. The basis of the claim of the first plaintiff is the deed of exchange, the development agreement and the deed of variation. Contrary to the submission of counsel for the fourth defendant, this is actually the principal claim in this suit after the final amendment to the *Further Re-amended Statement of Claim*.

It is clearly stated that prayer (A) which is the claim of the second plaintiff under the 2005 agreement *is in the alternative to prayer* (B) which is the claim of the first plaintiff under deed of exchange, the development agreement and the deed of variation. Therefore, the principal claim in this suit is the claim of the first plaintiff under the three agreements. In the premises, if the claim of the first plaintiff succeeds under prayer (B), it is unnecessary to make any order in respect of the claim of the second plaintiff under prayer (A) which is based on the 2005 agreement. In any event, at the end of the trial, the second plaintiff elected to drop its claim for specific performance under the 2005 agreement.

[19] Under the deed of exchange, Louis Leong and Jeff Leong agreed to sign away all their rights to the portion of the land in question delineated as 'the residential land'. The 'residential land' was clearly demarcated and identified to the knowledge of the parties because in the locality plan attached to the deed of exchange, a 66 feet road reserve ran across the land dividing it into two parts although there was no subdivision plan or development plan in existence. The so-called 'residential plan' is located to the east of the road reserve and marked on the locality plan attached to the deed of exchange.

Jeff Leong who signed the deed of exchange agreed that he did not object to the locality plan during cross-examination. He said as follows:

> Q: Did you or Louis Leong object to the locality of the residential land, the 66 feet wide road reserve and the commercial land as shown in the Locality 2 Plan at page of bundle B when you and Louis Leong signed the deed of exchange, the development agreement or the deed of variation?
>
> A: No.

[20] Thus, although Jeff Leong said in his evidence-in-chief that the condition of title did not refer to the road reserve or residential land, the effect of the deed of exchange is that Jeff Leong and Louis Leong had surrendered their proprietary

interest in the area marked as 'residential land' to the first plaintiff for valuable consideration. He also agreed that Louis Leong and he received four units of houses in Taman Union as consideration under the deed of exchange. In fact, during cross-examination, Jeff Leong agreed that he and Louis had no more interest in the residential land and that they were holding it in trust. He said as follows:

> PUT: That pursuant to the deed of exchange dated May 6, 1994, you and Louis Leong had no more interest in the residential land.
>
> A: Yes, at that point of time.
>
> PUT: That you and Louis Leong were holding the residential land in trust for the first plaintiff since 1997.
>
> A: Yes, we signed the deed of exchange

[21] There is no dispute that at a later date sometime between 1996 and 1997, all the four units of houses at Taman Union were transferred to Louis Leong and Jeff Leong or their nominees in accordance with the deed of exchange. Moreover, the signature of Louis Leong on the deed of exchange was not disputed by any party.

For the above reasons, the argument of counsel for fourth defendant that the deed of exchange is not a separate agreement but an 'indivisible' part of the development agreement and deed of variation is not valid. Moreover, the deed of development was not executed simultaneously with the deed of exchange but one month later. It is therefore a separate and independent agreement even though the latter agreements made reference to it. In the premises, there is merit in the submission that Louis Leong and Jeff Leong had become bare trustees in respect of the 'residential land' upon transfer of the four units of the houses at Taman Union to them or their nominees.

[22] Similarly, in the subsequent agreement between the same parties signed a month later, ie the development agreement, Louis Leong and Jeff Leong assigned all interest in the remaining portion of the land which is referred to as 'commercial land' to the first plaintiff. The consideration that was provided in the agreement was one shop lot each for Louis Leong and Jeff Leong. In the deed of variation signed later, the entitlement of Louis Leong and Jeff Leong was increased by an additional shop lot. The shop lots were to be delivered within 36 months failing which the first plaintiff was obliged to pay LAD in sum of RM500 per month. Jeff Leong agreed during cross-examination that pursuant to the deed of exchange and development agreement, he had no interest in the land except for the three shop lots promised under the deed of variation. Thus, counsel for plaintiffs submitted that Louis Leong and Jeff Leong had divested their proprietary interest in the 'commercial land' as well as the 'residential land' and have no interest in it except for lots 8, 9 and 10 which were completed in 1999 but not handed over.

[23] Counsel for the plaintiffs had submitted that once a purchaser of landed property had given the consideration that is due under the agreement in question, the registered owner becomes a bare trustee or that a constructive trust comes into existence by operation of law in favour of the buyer. The bare trust principle in favour of a purchaser of property who had paid the purchase price was discussed in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12;

[1996] 2 AMR 1537. In the more recent Federal Court case of *Tan Ong Ban v Teoh Kim Heng* [2016] 2 AMR 813; [2016] 3 CLJ 193, Tun Arifin Zakaria CJ (Malaysia) cited *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* with approval and said as follows:

> According to this principle, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property.
>
> The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner.

[24] In the instant case, under the terms of the deed of exchange, Louis Leong and Jeff Leong had clearly divested all proprietary interest in the eastern part of the land in question as demarcated in the locality plan that was attached. There is no dispute that the consideration for the land, ie four houses in Taman Union which belonged to the first plaintiff was transferred to them or their nominees. In fact, Jeff Leong agreed during cross-examination that he became a trustee when the houses were transferred to him.

In respect of the deed of development, the initial consideration was two shop lots. The consideration was later increased to three shop lots. During cross-examination, Jeff Leong agreed that his entitlement or interest in the 'commercial land' was only in respect of the three shop lots, ie shop lots 8, 9 and 10. He agreed that he and Louis had no interest in the 'commercial land'. He also agreed that the construction of the shop lots was completed except that the occupation certificate was not issued. His evidence is as follows:

> PUT: That in 1999, the first plaintiff had practically completed your entitlement of three shoplots in lot 8, 9 and 10 under the development agreement and deed of variation.
>
> A: Yes, but OC not issued.
>
> PUT: That pursuant to the development agreement and deed of variation, you and Louis Leong had no interest in the said land except three shoplots in lot 8, 9 and 10.
>
> A: Yes.

[25] Wong Kuang Chun also testified unchallenged that the additional consideration of RM73,000 under the deed of variation was fully paid to Louis Leong in four instalments. In my opinion, Louis Leong or his successors-in-title and Jeff Leong have become bare trustees of the entire land in question by virtue of the deed of exchange, the development agreement and the deed of variation. The consideration for the deed of exchange had been fully paid as the four houses were transferred to Louis Leong or his nominees and Jeff Leong. The cash consideration under the development agreement and deed of variation were also fully paid. According to the evidence, the shop lots that Louis Leong and Jeff Leong finally agreed to accept are lots 8, 9 and 10. Jeff Leong agreed that they were constructed

by the year 1999 although the occupation certificate had yet to be issued. Wong Kuang Chun had testified unchallenged that the said lots were completed and only re-wiring works were pending. He said re-wiring works were not completed because of the uncertainty caused by the defendants.

From the evidence, it is obvious that the delay was occasioned by the failure of Louis Leong and Jeff Leong to give vacant possession of the entire 'commercial land' to the first plaintiff. The first plaintiff managed to evict the occupant of the 'commercial land' where lots 13 to 21 were to be constructed only in June of 2010. Counsel for all the defendants submitted that since the power of attorney empowered the first plaintiff to take legal action against the occupant of the land, Louis Leong and Jeff Leong had not breached the development agreement by failing to give vacant possession.

I see no merit in this argument as under the development agreement, Louis Leong and Jeff Leong had granted the unfettered right to conduct development on the land to the first plaintiff. It is implied that they have to surrender vacant possession of the land to the first plaintiff in the first place for any sort of development to begin.

Jeff Leong also agreed that the occupants of the land, ie the Shih [sic] Tai Tze's family were their relatives. Furthermore, the development agreement clearly provides that any remedy for delay in handing over the vendors' lot is limited to LAD of RM500 per month. It also provides that even if the development agreement is terminated, it would not affect of the right of the developer ('the first plaintiff') to deal with the residential land. Thus it is clear from the terms of the development agreement that Louis Leong and Jeff Leong had completely divested themselves of the entire subject land in question. For all the above reasons, I find that Louis Leong and Jeff Leong had become bare trustees of the land subject only to their right to the completed vendors' lots.

For the same reasons, I also find that the argument that the first plaintiff had breached the development agreement for failing to deliver the completed shop houses within 36 months to be without any merit as it was Louis Leong and Jeff Leong who had failed to deliver vacant possession for the development project to be completed.

Thus, the administrator and successor in title of Louis Leong and Jeff Leong cannot now rely on the delay on the part of the first plaintiff in obtaining the occupation certificate for the completed vendors' lot to attempt to escape from their contractual obligations.

[66] As for Frankey's assertion that the agreements were terminated on 5 November 2018, it is to be noted that this was done pursuant to a so-called letter of termination that was issued after Frankey had obtained the *Jadual Tiga* which was issued on 18 October 2018, well after the judgment was granted in Suit 92 and after the judgment was upheld by the Court of Appeal. As mentioned earlier, the trial of Suit 92 (filed in 2013) took three years to complete. The first point is that Frankey had ample time to clothe himself with the proper *Jadual Tiga*.

[67] Secondly, Frankey had in fact held himself out as the administrator of the estate of the deceased. Thirdly, he could have, but chose not to file a Counterclaim and present his purported claim per Suit 123.

[68] In so far as the complaint that FDR had breached the DA and DOV by failing to deliver the shop lots as per the contractual timeline, as correctly observed by the JC, the landowners' remedy lies in the form of a monetary claim ie, LAD (as provided for in the contract) and nothing more. There is no right to terminate the DA and DOV as such. In this context, it is important to highlight that the delay in the completion of the commercial project (shop lots) is wholly attributable to the landowners themselves who delayed the handing over of vacant possession of the Commercial Land.

[69] Thus, any which way that one examines it, the outcome is crystal clear — that Suit 123 is barred by res judicata in the 'narrow sense' and the 'wider sense'. At any rate, for completeness, we felt compelled to consider whether by applying res judicata any injustice would be occasioned to Frankey.

[70] In this regard we considered the case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321; [2001] 1 MLRA 98 (CA), where Gopal Sri Ram JCA (at pp 357–358) said:

> Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. *Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result.*
>
> And there is respectable authority in support of the view I have just expressed.
>
> In *Carl-Zeiss Stiftung v Rayner and Keeler Ltd & Ors (No 2)* [1966] 2 All ER 532 at p 573, Lord Upjohn said:
>
> > As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue.
>
> It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938] 4 All ER 747 at p 755; [1939] AC 1 at p 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.* (Emphasis added.)
>
> In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:
>
> > In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a

point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings.

One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss*case [1966] 2 All ER 536 at p 573, [1967] 1 AC 853 at p 947. (Emphasis added.)

[71] We gave the matter our fullest consideration. However, we could not find any injustice to Frankey so as to preclude the application of res judicata. On the other hand, we are in fact convinced that there would be a gross injustice to FDR if the court declines to apply res judicata. The factors which we took into account in support of our conclusion that there would be injustice to FDR are:

(a) the entire factual matrix and the historical aspects of the matter;

(b) including but not limited to the fact that FDR had already fulfilled their bargain and had given the requisite consideration (the house units) to the deceased and Jeff as per the DOE but they (FDR) have not yet been given legal ownership of the residential land;

(c) despite the landowners' delay in the handing over of vacant possession of the commercial land (*due to the presence of the Shih Tai Tze family*) FDR had (in 1999) completed the construction of the shop lots (*save for the wiring*);

(d) transfer of legal ownership of the commercial land to FDR was stultified by the actions of the deceased, Jeff, and other related parties; and

(e) the delay in the project had caused massive financial implications to FDR who then became wound-up upon application by Public Bank Bhd.

[72] At any rate, in Suit 92 Frankey had asserted a claim over the 1/2 share interest in the land which was owned by the deceased. The High Court had unequivocally ruled that Frankey (as the successor in title of the estate of the deceased) held the land (residential land and commercial land) as 'bare trustees' for FDR who was declared as the beneficial owner thereof.

[73] It is of course trite that in an ordinary sale and purchase transaction, a bare trust will arise in favour of a purchaser, if the purchaser had paid the full purchase price.

[74] The principle of bare trust was enunciated in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 AMR 1537; [1996] 2 MLJ 12;

[1996] 2 CLJ 561 (FC). In the more recent Federal Court case of *Tan Ong Ban v Teoh Kim Heng* [2016] 2 AMR 813; [2016] 3 CLJ 193 (FC), Arifin Zakaria CJ (as he then was) cited *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* with approval and said as follows:

> According to this principle, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner.

[75] On the topic of 'bare trust', we think that it is instructive and necessary to also refer to decision of the Supreme Court in *Yeong Ah Chee v Lee Chong Hai & Anor And Other Appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20; [1994] 2 AMR 1445 (SC) where at p 26 (Justice Peh Swee Chin) (as he then was) said:

> It is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land. Please see *Lysaght v Edwards* [1976] 2 Ch D 499 and this case was cited with approval very often in our courts eg by the Federal Court in *Intercontinental Miners v Society Des Etains De Banjas Tudgu* [1974] 1 MLJ 145 and *Temenggong Securities Ltd v Registrar of Titles, Johore* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee ie unqualified trustee for the purchaser.
>
> It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam v Tham Kong* [1980] 2 MLJ 159, PC that 'the Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience.

[76] And for completeness, we should add that more recently, the bare trust principle was restated by the Federal Court in *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] MLJU 916; [2020] 7 CLJ 271; [2020] 1 LNS 663; [2020] 5 AMR 645; [2020] AMEJ 0637 (FC).

[77] Having due regard to the bare trust principle that was firmly established in the cases referred to above and considering the factual matrix concerning the agreements and the breach thereof by the deceased and Jeff in the manner as discussed in the judgment of the High Court in Suit 92, it is hardly surprising that the High Court had held that Jeff and Frankey held the land as bare trustees for FDR.

[78] That ruling is no longer open to review in Suit 123. It has been adjudged to be a case where a bare trust exists in respect of the land. And the Court of Appeal has upheld the judgment of the High Court. In our view, rightly so. And by not going further to the Federal Court, Frankey is deemed to have accepted the correctness of the Court of Appeal's decision and by extension, the High Court's decision in Suit 92.

[79] The attempt by Frankey to suggest that Suit 92 is only confined to the residential land is plainly disingenuous. In our view, such a suggestion is misguided and untenable.

[80] Clearly, Suit 92 pertained to the residential land and the Commercial land. And in the context of the application to strike out Suit 123, it is also not without significance that the orders that were granted in Suit 92 (see para 36 above) indisputably pertain to the residential land and the commercial land.

[81] According to Frankey, on 18 October 2018 he obtained a *Jadual Tiga* in respect of a half share over the land or the Commercial Land. On 5 November 2018 Frankey (on behalf of the estate of the deceased) purported to terminate the DA and DOV pertaining to the Commercial Land by reason of FDR's failure to deliver the 'vendors' lots', failing to subdivide the land as well as in charging the land to the bank.

[82] In our view, Frankey's rights or the rights of the estate of the deceased (if any) have 'merged' in the judgment of the High Court in Suit 92. In light of the decision in Suit 92, the rights that Frankey seems to be advancing or prosecuting are all defeated by the nemo dat rule.

[83] Thus, as stated by the Federal court in *Sia Hiong Tee & Ors v Chong Su Kong & Ors* , the estate of the deceased as a bare trustee for FDR, cannot transfer to Frankey what it has not got since Frankey's rights as transferee are derived from those of the estate of the deceased, as transferor.

[84] It is clear as it is obvious that the residential land and the commercial land were both the subject matter of Suit 92. And, after a full trial which stretched over a period of three years, declarations and consequential orders were granted in favour of FDR with respect to these parts of the land. Frankey had lodged an appeal to the Court of Appeal, but he was unsuccessful.

[85] Thus, the order of the High Court dated 10 October 2016 in Suit 92 is final, conclusive, and binding against all those who were parties to that action and their privies as well.

[86] Indeed, the correctness of that order has already been tested in the Court of Appeal and the outcome was in favour of FDR. It may not therefore be called into question in any subsequent proceedings, except on the narrow lines as per the seminal case of *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 MLRA 183; [1998] 1 AMR 909 (FC).

[87] Contrary to the position that was taken by counsel for Frankey, we do not agree that the JC has erred in her approach to the issues at hand and in her ultimate decision and discretion to strike out Suit 123. It is settled law that in an appeal against the exercise of discretion by a judge, the initial function of this court is one of review only, there being no original discretion vested in this court.

[88] It is only after an appellant is able to convincingly demonstrate to us that his case comes within one or more of those categories of cases in which appellate interference is warranted does this court become entitled to exercise a discretion of its own. In the present case, in exercising her discretion the JC had applied her mind to all the relevant facts and circumstances of the case.

[89] The JC also properly directed herself upon the principles of law that were applicable to the case before her. After weighing all relevant considerations, the JC came to the conclusions as per the grounds of judgment. In conclusion, we are of the view that the appellant has failed to demonstrate any error on the part of the JC when she came to exercise her discretion to strike out Suit 123.

[90] We are satisfied that the JC exercised her discretion correctly and did not take into account any irrelevant consideration or omit any relevant consideration or make any error of principle when making her decision.

[91] The appeal is devoid of merits and is therefore dismissed with costs of RM10,000 (subject to allocator).

Appeal dismissed with costs of RM10,000.

Reported by Ashok Kumar